No. 11907

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN R. QUINN, County Assessor, and H. L. BYRAM, County Tax Collector, of Los Angeles County,

Appellants,

vs.

AERO SERVICES, INC., a corporation, debtor,

Appellee.

APPELLANTS' BRIEF

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APPELLANTS' BRIEF

Basis for Jurisdiction

I.

Statement of Proceedings.

On June 3, 1946, the Appellee, Aero Services, Inc. (hereafter called "Debtor"), filed a petition with the District Court of the United States for the Southern District of California, Central Division (hereafter called "Bankruptcy Court"), for an arrangement with its creditors pursuant to Chapter XI of the Bankruptcy Act (52 Stat. 905; 11 U. S. C. A., Sec. 701-799)

(T. R. 2-13). Thereafter, by appropriate orders, the Bankruptcy Court referred the petition to the Honorable Benno M. Brink, Referee in Bankruptcy, and permitted the Debtor to remain in possession of its assets (T. R., 13-14, 16).

On December 6, 1946, the Debtor filed a petition for an order directing John R. Quinn and H. L. Byram, respectively the Los Angeles County Assessor and Tax Collector (hereafter called "County Tax Officers"), to appear and show cause why the Referee should not determine the amount of the taxes due by it to Los Angeles County and should not direct the manner and time of the payment of such taxes (T. R., 20-22, 40). The requested order being issued, (T. R., 17), the County Tax Officers answered (T. R., 23-30) and objected to the Bankruptcy Court's jurisdiction (T. R., 31-35). After a hearing the Referee overruled the objections to jurisdiction and, following appropriate proceedings (T. R., 17), on direction of the Bankruptcy Court, entered on September 8, 1947, a written order affirming the jurisdiction of that court (T. R., 42-45). Thereafter the County Tax Officers filed a petition for review of the Referee's order by the Bankruptcy Court (T. R., 47-60). On December 31, 1947, the Bankruptcy Court (the Honorable J. F. T. O'Connor, District Judge) ordered that the County Tax Officers' objections to the jurisdiction of the Bankruptcy Court be overruled (75 F. Supp. 347) (T. R., 61-79). On January 29, 1948, the County Tax Officers filed a notice of appeal (T. R., 80). The Bank-

ruptcy Judge thereafter signed a formal order affirming the order of the Referee and overruling the objections to the Bankruptcy Court's jurisdiction (T. R., 91-92). This order was entered and docketed on March 26, 1948 (T. R., 92). The County Tax Officers filed a new notice of appeal on April 7, 1948 (T. R., 93). The appeals are submitted on a single record and will be hereafter referred to as if they constituted a single appeal.

II.

Jurisdiction of the Bankruptcy Court.

The Bankruptcy Court obtained jurisdiction of the Debtor and his property under Section 311 of the Bankruptcy Act (52 Stat. 906, 11 U. S. C. A. Sec. 711). It referred the matter to a Referee under Section 331 of the Bankruptcy Act (52 Stat. 908, 11 U. S. C. A., Sec. 731) and continued the Debtor in possession under Section 342 (52 Stat. 909, 11 U. S. C. A., Sec. 742) of the Bankruptcy Act. The Referee heard the Debtor's petition to show cause by virtue of Section 64a (4) of the Bankruptcy Act (60 Stat. 330, 11 U. S. C. A., Sec. 104(a) (4)).

The jurisdiction of the Bankruptcy Court to review the Referee's order is found in Section 39c of the Bankruptcy Act (52 Stat. 858, 11 U. S. C. A., Sec. 67c) and Rule 204, Bankruptcy Rules of the District Court of the United States for the Southern District of California.

III.

Jurisdiction of the Circuit Court of Appeals.

The two notices of appeal were filed under Rule 73a of the Rules of Civil Procedure. The jurisdiction of the Circuit Court of Appeals to hear this appeal is granted by Sections 24a and b and Section 316 of the Bankruptcy Act (52 Stat. 854, 11 U. S. C. A., Sec. 47a and b; 52 Stat. 907, 11 U. S. C. A., Sec. 716). The order from which this appeal is taken is appealable. (*Arkansas Corporation Com. v. Thompson,* (1940) (C. C. A. 8), 116 F. 2d 179, 181, (affirming *In re Missouri Pacific Ry Co.,* (1940) (E. D. Mo.) 33 F. Supp. 728); *certiorari* granted and case reversed on the merits, (1941) 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244.)

Statement of the Case

This is an appeal by the County Tax Officers from the order of the Bankruptcy Court affirming its jurisdiction under Section 64a(4) of the Bankruptcy Act (60 Stat. 330, 11 U. S. C. A. Sec. 104(a)(4) to redetermine the assessed valuation of the Debtor's personalty for county property tax purposes.

The first Monday in March is the tax and lien date in California. (Calif. Rev. & Tax. Code Secs. 405, 2192, 117.) On said day the Debtor was the owner of the personalty in question and of certain real property situated in Los Angeles County, on which the personal property tax to be thereafter determined then became a lien (T. R., 39, Calif. Rev. & Tax. Code Sec. 2189). On May 14, 1946, a verified declaration of the property for county tax purposes, made on behalf of the Debtor by its auditor, was filed with the County Assessor (T. R., 39). This declaration showed the taxable value of the aforesaid personalty of the Debtor on the aforementioned first Monday in March, 1946, to have been $355,710 (T. R., 39). Thereafter, on or at some time prior to the first Monday of July, 1946, the County Assessor fixed the value of this personalty for county tax purposes at the figure named in the declaration (T. R., 16, Calif. Rev. & Tax. Code, Sec. 616).

On June 3, 1946, the Debtor initiated bankruptcy proceedings by filing its petition under Section 322 of Chapter XI of the Bankruptcy Act (T. R., 2-13). On July 1, 1946, the County Board of Equalization

commenced its review of all assessments within the county for the purpose of correcting any errors of the County Assessor and for the further purpose of equalizing the assessments (T. R., 40, Calif. Rev. & Tax. Code, Secs. 1603, 1605). The Debtor failed to file an application for or to appear at the public hearings before this Board to secure a reduction in its personalty assessment (T. R., 40). Accordingly, said assessment at the aforesaid figure became final on or about July 15, 1946. (Calif. Rev. & Tax Code, Sec. 1614.)* Thereafter, a tax bill, based upon the aforesaid assessment, was submitted to the Debtor (T. R., 40).

On November 1, 1946, the county tax upon this personalty became due and on December 5, 1946, it became delinquent (T. R., 40; Calif. Rev. & Tax. Code, Secs. 2605, 2617). The following day, December 6, 1946, the Debtor filed a petition with the Bankruptcy Court for an order directing the County Tax Officers to appear and show cause why the Bankruptcy Court should not redetermine the assessed valuation of the Debtor's personalty for county tax purposes (T. R., 20-22). The order being issued (T. R., 17), the County Tax Officers answered and objected to the jurisdiction of the Bankruptcy Court to make such a redetermination (T. R., 23-35). After a hearing the Referee overruled the objections of the County Tax Officers (T. R., 42-45), and upon review the Bankruptcy Court af-

*Even if it is conceded for the purpose of argument only that the time to appear before the County Board of Equalization was extended by Section 11e of the Bankruptcy Act (11 U. S. C. A., Sec. 29a), it was extended only sixty days subsequent to the date of adjudication, or until August 2, 1946. (Sec. 312(2), Bankruptcy Act; 11 U. S. C. A., Sec. 712(2).)

firmed the order of its Referee (T. R., 61-79 and 91-92). The County Tax Officers thereupon took this appeal (T. R., 80, 93).

Upon this appeal there is no issue of fact between the parties (T. R., 19). The sole question of law is the jurisdiction of the Bankruptcy Court to redetermine the assessed valuation of the Debtor's personalty for county tax purposes under the circumstances above set forth. So far as here material, Section 64a(4) reads as follows:

> "Sec. 64. DEBTS WHICH HAVE PRIORITY. a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be . . . (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof; . . . *And provided further,* That in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; . . ." (Italics theirs.)

The Bankruptcy Court and its Referee both took the position that the bankruptcy proceedings having been initiated prior to the time at which the challenged assessment became final, the limitation placed upon the Bankruptcy Court's jurisdiction, under the language of Section 64a (4) quoted above, by *Arkansas Corporation Com. v. Thompson,* (1941), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244, is without application and therefore the Bankruptcy Court may, under the grant

of power made by the proviso quoted above, redetermine the assessment.

Our position, on the other hand, is that (as will be explained in our Summary of the Argument and as will be developed fully in the argument itself) the limitation upon the Bankruptcy Court's jurisdiction imposed by the Arkansas decision does apply and consequently the Bankruptcy Court in this case was without power to make the order from which this appeal is taken.

Specification of Errors

1. The Bankruptcy Court erred in ignoring the fact that a final quasi judicial determination of the challenged assessment had been made under California law long prior to the time of the application to it for redetermination of that assessment.

2. The Bankruptcy Court erred in failing to give effect to the finality of the quasi judicially determined assessment at issue.

3. The Bankruptcy Court erred in not recognizing that it lacked the power to disturb the challenged assessment under the rule of *Arkansas Corporation Com. v. Thompson* (1941), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244.

Summary of the Argument

It is submitted that the conclusion of the Bankruptcy Court and of its Referee that the court had jurisdiction under Section 64a(4) of the Bankruptcy Act to redetermine the challenged assessment, because bankruptcy proceedings were initiated about six weeks prior to the time when the challenged assessment became final, is incorrect and a perversion of the function of Bankruptcy Courts under the doctrine of *Arkansas Corporation Com. v. Thompson* (1941), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244. Stated otherwise the common error of the Bankruptcy Court and its Referee lies in their assumption that the limitation upon the court's jurisdiction imposed by the Arkansas decision does not apply where bankruptcy proceedings are initiated before the assessment at issue is finally quasi judicially determined. A careful reading of the Arkansas decision would have prevented this error. The facts recited in the Supreme Court's opinion at page 140 reveal that in this controlling case bankruptcy preceded the finality of the challenged assessment by some six years. Moreover, the identical question had been decided adversely to our Bankruptcy Court's position in *Baumann v. Sheehan* (1944) (C. C. A. 8), 140 F. 2d 747, 751.

Obviously, the Arkansas and the Baumann cases embody the correct rule since the existence of a power must always be determined as of the time of its exercise. Here the assessment under attack had been

finally quasi judicially determined almost five months prior to the application to the Bankruptcy Court for redetermination. Redetermination under such circumstances would manifestly make the Bankruptcy Court a "super-assessment tribunal"—a status forbidden to it by the Arkansas decision.

The argument that follows demonstrates that the assessment at issue was quasi judicially determined, that it became final almost five months prior to the application to the Bankruptcy Court for redetermination, and that consequently the Bankruptcy Court, under the rule of the Arkansas decision, lacked at that time the power to act thereon.

Accordingly, it is respectfully submitted that the order appealed from should be reversed.

Argument

I.

The California Procedure for Assessment of Property Taxes Provides a Valid Quasi Judicial Determination Thereof.

A. *The Procedure.**

The assessment procedure in California functions from March to July and in some cases into August. Between the first Mondays in March and July the County Assessor is required to ascertain and assess all taxable property within his jurisdiction as of the first Monday in March. (Sec. 405.) Between the first Monday in March and the last Monday in May each taxpayer is required to file with the County Assessor a verified declaration of his taxable property. (Sec. 441.) In addition, the County Assessor is authorized to subpoena and examine any taxpayer with respect to any statement disclosing taxable property. (Sec. 454.) Upon completion of the assessment roll on or before the first Monday in July, he delivers it to the County Board of Equalization. (Secs. 616, 617).

The County Board of Equalization, immediately upon receipt of the roll, gives notice by publication of its completion and the time at which the Board will meet to equalize assessments. (Sec. 1601.) Taxpayers desiring reductions in their assessments must,

*All statutory citations in this subdivision are to the California Revenue and Taxation Code.

either in person or by an agent, then file verified written applications for such reductions setting forth the supporting facts and the applicants must be examined under oath by the Board concerning the value of their property. (Secs. 1607, 1608.) The Board may, in the course of its hearing of any application, subpoena witnesses and take evidence and the Assessor and his deputies must be present to present evidence as needed. (Secs. 1609, 1610.) The session of the Board commences on the first Monday in July and continues not later than the third Monday in July. (Sec. 1603).* For the purpose of equalizing assessments the Board may increase or decrease individual assessments. (Sec. 1605.) Following the close of the Board's session the corrected assessment roll is delivered to the County Auditor for totaling of the valuations thereon. (Secs. 1614, 1646.)

B. *Its legal effect.*

From the foregoing recital of the California assessment procedure it is apparent that the Assessor may act judicially within the meaning of the Arkansas decision (*Arkansas Corporation Com. v. Thompson* (1941), 313 U. S. 132, 143-144, 61 S. Ct. 888, 85 L. Ed. 1244), in that he may hold hearings in arriving at his assessed valuations. However, he is not compelled to do so and there is nothing in the record to indicate that he did so in the present case, in view of the fact

*The County Board of Equalization may secure an extension of its session for not more than 20 days (or 40 days in the event of a public calamity) but said extension does not extend the deadline for filing applications for reduction of assessments. (Sec. 155.)

that such a hearing was apparently made unnecessary by reason of his acceptance of the Debtor's declared valuation. Consequently we do not argue that the County Assessor here acted judicially within the meaning of the Arkansas rule, although he obviously did so within the broad meaning of the term "judicial." (*Siebe v. Superior Court* (1896), 114 Cal. 551, 552, 46 Pac. 456; 3 Cooley, Taxation (4th Ed. 1924), Sec. 1143, p. 2296.)

On the other hand, the California assessment procedure requires the County Board of Equalization to give notice of its session and to hold hearings upon every verified written application for reduction in assessment duly presented to it. These hearings must include examination of the applicants under oath concerning the value of their property, and the Board may subpoena witnesses and take evidence as necessary, including that of the Assessor and his staff, who must be present as needed. Clearly this procedure for the review of the correctness of the assessments made by the County Assessor and for their equalization constitutes a valid and constitutional quasi judicial determination. (*Hagar v. Reclamation Dist. No. 108* (1884), 111 U. S. 701, 710, 4 S. Ct. 663, 28 L. Ed. 569.) The California cases so hold without exception.

In the early case of *People v. Goldtree* (1872), 44 Cal. 323, the California Supreme Court said at pages 325-326:

> ". . . The Board of Equalization, in passing on the question whether an assessment is too

high or too low, *acts in a judicial capacity,* and its decision is an adjudication, and as clearly so as a judgment for the recovery of a tax. . . ." (Italics ours.)

In *Oakland v. Southern Pacific Co.* (1900), 131 Cal. 226, 230, 63 Pac. 371, the settled rule in California was declared to be that the Board could act *only upon evidence* in raising or lowering an assessment.

In *Los Angeles Etc. Co. v. County of L. A.* (1912), 162 Cal. 164, 121 Pac. 384, 9 A. L. R. 1277, the court spoke as follows at page 169 with respect to the function of the County Board of Equalization:

" . . . Upon such hearing it is the duty of such board to determine the value of the property under consideration for assessment purposes upon such basis as is used in regard to other property, so as to make all the assessments as equal and fair as is practicable. In discharging these duties *the board is exercising judicial functions,* and its decision as to the value of the property and the fairness of the assessment *so far as amount is concerned* constitutes an independent and conclusive judgment of the tribunal created by law for the determination of that question which abrogates and takes the place of the judgment of the assessor upon that question. . . ." (Italics ours.)

II.

The Challenged Assessment Became Final and Conclusive Upon Termination of the County Board of Equalization's Proceedings.

The latest case in California enunciating this thoroughly established principle is *Universal Cons. Oil Co. v. Byram* (1944), 25 Cal. 2d 353, 153 P. (2d) 746. There the court stated at page 362:

> ". . . As appears from the numerous authorities cited in the forepart of this opinion, the respective county board of equalization is the fact-finding body designated by law to remedy excessive assessments (Cal. Const., art. XIII, Sec. 9), and when that tribunal, after due hearing and within the limits of reasonable discretion, makes its *findings on the facts,* such decision is final and conclusive. . . . " (Italics theirs.)

Like statements of this basic principle may also be found in:

Eastern Columbia, Inc. v. County of Los Angeles (1943), 61 Cal. App. 2d 734, 744-745, 70 P. (2d) 507;

Hammond L. Co. v. County of Los Angeles (1930), 104 Cal. App. 235, 241, 285 Pac. 896;

Globe G. & M. Co. v. Los Angeles Co. (1923), 62 Cal. App. 297, 299, 216 Pac. 631;

San Jose Gas Co. v. January (1881), 57 Cal. 614, 616.

To quote again from *Los Angeles Etc. Co. v. County of L. A., supra,* 162 Cal. 164 at page 168 (121 Pac. 384):

> ". . . The law necessarily leaves the determination of the question of fact of value to certain officers, and when it appoints tribunals for that purpose, as in this state primarily the assessor, and, for purpose of review, the board of supervisors acting as a county board of equalization, the conclusion of those tribunals on such a question of fact constitutes a judgment that is not collaterally assailable in the courts. This is the universal rule, and it has been so held in this state. (Citing authority.) . . . "

A. *This finality is not affected by the failure of the taxpayer to avail himself of his right to review by the County Board of Equalization.*

This obvious corollary to the basic rule of finality has long been established in California. (*Luce v. City of San Diego* (1926), 198 Cal. 405, 245 Pac. 196; *Dawson v. County of Los Angeles* (1940), 15 Cal. 2d 77, 81, 98 P. (2d) 495). It is likewise followed elsewhere (3 Cooley *op cit.* Sec. 1201, p. 2406), and is but an application of the more general and well settled rule that a judgment by default is a proper basis for a plea of res judicata and estoppel. (*Guardianship of Jacobson* (1947), 30 Cal. 2d. 326, 334, 182 P. (2d) 545; *Fitzgerald v. Herzer* (1947), 78 Cal. App. 2d. 127, 131-132, 177 P. (2d) 364; Rest., Judgments, Sec. 68, p. 294, 302; Note, 128 A. L. R. 472, 474.)

III.

The Bankruptcy Court is Without Power to Redetermine The Challenged Assessment Following the Quasi Judicial Determination Thereof Pursuant to California Law.

This is the rule of *Arkansas Corporation Com. v. Thompson* (1941), 313 U. S. 132, 61 S. Ct. 888, 85 L. Ed. 1244. There the Missouri Pacific Railroad went into reorganization under Section 77 of the Bankruptcy Act in 1933. The Trustee in Bankruptcy, who was operating the railroad, participated in an assessment hearing before the Arkansas Corporation Commission concerning the 1939 taxes to be levied upon the railroad. Instead of appealing from the assessment order of the Commission to the state courts the Trustee allowed his time for appeal to lapse and then thereafter petitioned the Bankruptcy Court to determine the assessment (pp. 140-141). Under Section 64a(4) of the Bankruptcy Act the Bankruptcy Court held that it had the power to make the requested determination and the Circuit Court of Appeals affirmed this holding. The Supreme Court, however, reversed. After quoting the applicable language of Section 64a(4), quoted herein, *supra,* the court said at pages 142-143:

> ". . . Nothing in this language indicates that taxpayers in bankruptcy or reorganization are intended to have the extraordinary privilege of two separate trials, one state and one federal, on an identical issue of controverted fact—the

value of the property taxed. Manifestly, whether or not taxes are 'legally due and owing' to a state depends upon the valid laws of that state. *Ad valorem* taxes depend upon a determination of value. The governmental function of fixing the value for tax purposes has rarely, if ever, been a judicial function. . . ."

Toward the end of its opinion the court further said at page 145:

". . . Bankruptcy and reorganization proceedings today cover a wide area in the business field. But there is nothing in the history of bankruptcy or reorganization legislation to support the theory that Congress intended to set the federal courts up as *super-assessment tribunals* over state taxing agencies. . . ." (Italics ours.)

The rule of the Arkansas case that the Bankruptcy Court is without power to disturb a final quasi judicially determined assessment has been reiterated rather recently in *Gardner v. New Jersey* (1947), 329 U. S. 565, 67 S. Ct. 467, 91 L. Ed. 504. The court spoke as follows at page 578:

"*Third.* We held in *Arkansas Corp. Commission v. Thompson,* 313 U. S. 132, 85 L. Ed. 1244, 61 S. Ct. 888, 45 Am. Bankr. Rep. (N. S.) 462, *supra,* that the reorganization court lacked the power under Sec. 77 to redetermine for state tax purposes the property value of a railroad where that value had already been determined in state proceedings *which afforded ample protection to the railroad's rights.* We adhere to that decision. Its ruling

> precludes redetermination by the reorganization court in this case of the valuations underlying the assessments made by the state authorities and the validity of those assessments used as the basis for the computation of the taxes. (Latter italics ours.)

There is but one fundamental factual distinction between the Arkansas case and the instant case. In the Arkansas case the Trustee in Bankruptcy participated in the assessment hearing before the state administrative agency; here the Debtor ignored the opportunity for a hearing on his assessment before the County Board of Equalization. This factual distinction is, however, without legal consequence so far as the basis for the rule of the Arkansas case is concerned. Our Bankruptcy Court itself conceded this in the following language (T. R., 74):

> "The minimum requirement apparently would be a determination by a quasi-judicial body in conjunction with quasi-judicial hearing, *or at least the right to such hearing.*" (Italics ours.)

In so stating it was following two Circuit Court decisions which held that the failure of the bankrupt to avail himself of the quasi judicial review of the challenged assessments afforded him by the state, could not invest the Bankruptcy Court with power under Section 64a(4) to revise the assessment. (*Commonwealth of Pennsylvania v. Aylward* (1946), (C. C. A. 8), 154 F. 2d. 714, 717; *In re Ingersoll Co.* (1945), (C. C. A. 10), 148 F. 2d. 282, 284.) As argued under Point

II (A) *supra,* these two federal decisions were in accord with the comparable California law and merely applied a fundamental rule of res judicata and estoppel. (See *Gardner v. New Jersey, supra* (1947), 329 U. S. 565, 584; *Lyford v. City of New York* (1943), (C. C. A. 2), 137 F. 2d 782, 786.)

This brings us at last to the strange basis for the Bankruptcy Court's decision in this case. The court held that the circumstance that the bankruptcy proceedings were initiated prior to opportunity for quasi judicial determination of the challenged assessment precluded the application of the Arkansas rule (T. R., 79). The facts of the Arkansas case itself, as recited above, belie this conclusion. The railroad had been in bankruptcy for some six years before the assessment challenged in the Bankruptcy Court was made. Furthermore, this identical question had been decided adversely to the position taken by our Bankruptcy Court in *Baumann v. Sheehan* (1944), (C. C. A. 8), 140 F. 2d. 747, 751, where the contested assessments were largely made while the property was in the possession and under control of the liquidating trustee.

IV.

Conclusion

It is respectfully submitted that the Arkansas and Baumann decisions embody the correct interpretation of the Bankruptcy Court's power under Section 64a(4) in view of the elementary proposition that the question of the existence of a power must be determined as of the time the power is sought to be exercised. Since the assessment at issue had been finally determined by a quasi judicial body some five months prior to the application to the Bankruptcy Court for redetermination, the Bankruptcy Court at the time of the application for redetermination was without power to act thereon.

Accordingly, the order appealed from should be reversed.

Respectfully submitted,

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